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No. 796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

LOYAL PROTECTIVE LIFE INSURANCE COMPANY,

Petitioner,

v.

MONARCH LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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February 26, 1964.

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Opinions Below.

The opinion of the District Court (App. A of Petition) is reported at 217 F. Supp. 210. The opinion of the Court of Appeals for the Second Circuit. (App. B. of Petition) is unreported.

Jurisdiction.

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. §1254(1).

Question Presented.

The sole question presented is whether the private treble damage remedy is available for an illegal boycott in the insurance business.

Statutes Involved.

The pertinent provisions of Section 1 of the Sherman Act, 15 U. S. C. §1; Section 7 of the Sherman Act, 26 Stat. 210; Act of July 7, 1955, repealing Section 7 of the Sherman Act, 69 Stat. 283; Section 4 of the Clayton Act, 15 U. S. C. §15, and Sections 1-4 of the McCarran Act, 15 U. S. C. §§1011-1014 are set forth in Petition Appendix C.

Statement.

(a) The Complaint.

Monarch Life Insurance Company (hereinafter "Monarch") has filed a complaint in the District Court for the Southern District of New York against petitioner Loyal Protective Life Insurance Company (hereinafter "Loyal") alleging damages suffered as a result of an insurance boycott in violation of Section 1 of the Sherman Act (Record pp. 1-12). The complaint demands treble damages under Section 3(b) of the McCarran Act and under Section 4 of the Clayton Act.

(b) The Motion to Dismiss.

Loyal has moved to dismiss the complaint for lack of jurisdiction over the subject matter, on the ground that the treble damage remedy is not available for boycotts in the insurance business. (Record pp. 21-40).

(c) Opinion of the District Court.

The District Court granted Loyal's motion to dismiss for lack of jurisdiction, holding: (1) that Section 2(b) of the McCarran Act provided that the Sherman Act, the Clayton Act, and the Federal Trade Commission Act shall not be applicable to the business of insurance in states where that business is regulated by state law, and that the applicable state, New York, did regulate the business of insurance, resulting in the "repeal of the Sherman, Clayton and Federal Trade Commission Acts". (Petition App. A pp. 4-5); (2) that Section 3(b) of the McCarran Act preserved from the effect of section 2(b) only the Sherman Act, in cases of boycott, coercion or intimidation, but did not preserve the treble damage provision of the Clayton Act (Id. pp. 12-13); and (3) that on the repeal in 1955 of the treble damage remedy found in Section 7 of the Sherman Act, Congress "impliedly, although perhaps unwittingly, stated there was no longer to be any private civil remedies for violations of the Sherman Act in the insurance industry." (Id. p. 16). The District Court further held that Section 7 of the Sherman Act was not saved from repeal in 1955 by its adoption by Section 3(b) of the McCarran Act in 1945 (Id. pp. 6-10).

(d) Opinion of The Court of Appeals.

The Court of Appeals reversed the judgment of the District Court and held that the private treble damage remedy under Section 4 of the Clayton Act was available for insurance boycotts in violation of Section 1 of the Sherman Act. Noting that Section 3(b) of the McCarran Act provides that:

> "[n]othing contained in this act shall render * * * the Sherman Act inapplicable to any agreement to boycott,"

the Court held that the construction adopted by the District Court "*would* severely impair the applicability of the Sherman Act to 'any agreement to boycott' ". (Petition App. B p. 9). The Court held, in effect, that under Section 3(b) of the McCarran Act the treble damage provision of Section 4 of the Clayton Act was preserved, because it was necessary in order to give full effect to the boycott prohibitions of Section 1 of the Sherman Act. The Court based its construction of Section 3(b) of the McCarran Act on the following factors: (1) legislative history shows that in enacting the McCarran Act in 1945 Congress intended the treble damage remedy to be available for insurance boycotts (Id. p. 6); (2) the private treble damage remedy has a "fundamental role" in Federal antitrust law enforcement (Id. p. 7); (3) Congress could not possibly have intended to eliminate the treble damage remedy for insurance boycotts in enacting the McCarran Act in 1945, because the treble damage provision found in Section 7 of the Sherman Act was then in effect (Id. p. 7); (4) the repeal of Section 7 of the Sherman Act in 1955 was "designed to remove duplication" with Section 4 of the Clayton Act, "while leaving substantive rights undisturbed" (Id. p. 8); and (5) Section 3(b) was "intended to exclude certain forms of conduct [i.e., boycott, coercion and intimidation]—and not merely certain statutory sections—from the general pattern of deference to state legislation." (Id. p. 9).

Holding as it did that all Federal law necessary to give effect to the boycott prohibitions of the Sherman Act was to be preserved, it was unnecessary for the Court of Appeals to review those portions of the District Court's opinion which held: (1) that Section 2(b) of the McCarran Act "repealed" the Clayton Act insofar as it applied to the insurance business; (2) that McCarran Act 3(b) did not

adopt Section 7 of the Sherman Act so as to preserve it from repeal in 1955; and (3) that it had no jurisdiction under 28 U. S. C. §§1331, 1337 to award compensatory damages for a violation of Section 1 of the Sherman Act.

ARGUMENT.

I.

The decision of the Court of Appeals below is clearly correct.

Loyal's entire position is based on the asserted failure of Section 3(b) of the McCarran Act to preserve the applicability of the treble damage provision of Section 4 of the Clayton Act. The Court of Appeals held, however, that it was unnecessary for the McCarran Act Section 3(b) to refer specifically to any remedial provision, because Section 3(b) was "intended to exclude certain forms of conduct—and not merely certain statutory sections—from the general pattern of deference to state legislation." Only the Sherman Act was mentioned because, in the opinion of the framers of this provision, the Sherman Act was the only anti-trust law forbidding boycotts, coercion and intimidation. It is not contended that Clayton Act §4 forbids boycotts, coercion or intimidation, and therefore there was no reason for McCarran Act §3(b) to refer specifically to this remedial provision. The following considerations demonstrate conclusively the correctness of this construction of Section 3(b).

(1) The history of the treble damage remedy shows that it is an essential feature of anti-trust enforcement. Senator Sherman himself emphasized the importance of the private remedy for anti-trust enforcement in 1890 when he stated:

> "[I]t is important to citizens that they should have some remedy in a court of general jurisdiction in the United States to sue for and recover the damages they have suffered. I think myself the rule of damages is too small * * *. Very few actions will probably be brought, but the cases that will be brought will be by men of spirit, who will contest against these combinations." 21 Cong. Rec. 2569 (1890).

At the time of the enactment of the Clayton Act, Rep. Webb, one of the House Managers, in referring to section 4, stated:

> "That * * * will have a more deterrent effect on the men who practice those things than a mere criminal penalty, and we all know that the disinclination of juries in some quarters to convict men under these criminal sections has resulted in their acquittal." 51 Cong. Rec. 16274 (1914).

This Court has on many occasions taken notice of the importance of the treble damage remedy to antitrust enforcement. See *e.g.*, *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174 (1915); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 751 (1947); *Radovich* v. *National Football League*, 352 U. S. 445 (1957). As noted by the Court of Appeals below, "[a]t this day and age, an exhaustive citation of authorities is hardly necessary to establish the fundamental role of the private remedy in Federal antitrust law enforcement" (Petition App. B., p. 7).

(2) In enacting McCarran Act §3(b) in 1945 Congress intended to preserve the full panoply of anti-trust remedies for a boycott violation of the Sherman Act. Not only had Congress consistently recognized the importance of the treble damage remedy as a factor in the enforcement of the

anti-trust laws on many occasions since 1890, but the legislative history attending the enactment of the McCarran Act in 1945 conclusively shows that Congress intended the treble damage remedy to be available to vindicate a boycott violation of the Sherman Act. H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945), in referring to the provision of S. 340 which later became Section 3(b) of the McCarran Act, stated at p. 3 that this provision:

> "* * * provides that at no time are the prohibitions in the Sherman Act against any act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect."

Clearly these provisions could not possibly be in full force and effect if there were no longer available a private remedy to enforce the provisions. It would be absurd to conclude that Congress has stripped from the remedies available to vindicate what it regarded as the most serious violation of the Sherman Act (cases of boycott, coercion and intimidation) the private remedies of treble damages and the injunction. The statement of the House Managers appended to H. R. Rep. 215, 79th Cong., 1st Sess. (1945) stated that section 3(b) made clear:

> "[t]he intention of the Congress that the acts of boycott, coercion, and intimidation are subject to the operation of the *suspended statutes* even during the moratorium period." (Emphasis added.)

The moratorium period was the three year period from 1945 to 1948, referred to in section 3(a), which was adopted to give the states time to regulate the insurance business before the anti-trust acts were applied to the insurance business. Since the Clayton Act was one of the "suspended

statutes" referred to in section 3(a), this quoted statement makes clear the understanding of the House Managers of the McCarran Act that section 3(b) preserved the Clayton Act as well as the Sherman Act, in cases of boycotts, coercion and intimidation, even during the moratorium period. If Congress understood that the Clayton Act was to be preserved even during the moratorium period, then *a fortiori* it would be preserved after the moratorium.

(3) The availability of the treble damage remedy provided by Sherman Act §7 demonstrates that Congress could not have intended to eliminate the treble damage remedy in cases of insurance boycott violations on the enactment of McCarran Act §3(b) in 1945. Loyal contends (Petition p. 9) that in 1945 Congress had eliminated the treble damage remedy for insurance boycott violations of the Sherman Act and (id. p. 10) that the "language of the entire Act clearly negatives any suggestion that Congress intended to afford private litigants such a remedy—even in 1945 before Section 7 of the Sherman Act was repealed." The fact is that Section 7 of the Sherman Act was in effect in 1945 and that the treble damage remedy was available for boycotts in the insurance industry even after the McCarran Act was enacted. If Congress intended to eliminate the treble damage remedy for insurance boycotts in 1945, the language it chose to effectuate that intention was singularly ineffective, for no court has yet suggested that the treble damage remedy was not available prior to 1955. Although the Sherman Act §7 was in effect in 1945, it was completely duplicated by Clayton Act §4, which provided a treble damage remedy for violations of all of the antitrust laws, including the Sherman Act. The fact that Section 7 of the Sherman Act was still in effect in 1945

shows conclusively that Congress could not have intended at that time to eliminate the treble damage remedy for an insurance boycott violation.

Thus, Loyal's entire position comes down to the proposition that everything was changed in 1955 when Section 7 of the Sherman Act was repealed. The legislative history of this repeal, cited *infra*, shows conclusively that this repeal was intended for no other purpose than to eliminate duplication with Section 4 of the Clayton Act, and could not have been intended to deprive private litigants of their treble damage remedy.

Although Sherman Act §7 was in effect in 1945, both Loyal and Monarch had pointed out to the Court of Appeals that it had "already become something of a dead letter in 1945" (Petition App. B, p. 5). This fact certainly suggests that if in 1945, Congress intended to do what it did in fact do—preserve the treble damage remedy for insurance boycotts—then if intended to do this through the instrumentality of the only treble damage provision appearing in the United States Code and generally in use, Section 4 of the Clayton Act.

(4) The dividing line between state and federal regulation of insurance under the McCarran Act is based on the conduct involved rather than the statutes involved. As noted by the Court of Appeals below (Petition App. B, p. 4) the McCarran Act was the Congressional response to the decision of this Court in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944) that the insurance industry was subject to federal anti-trust regulation. The purpose of the McCarran Act, made clear by §§1 to 3, is to define the dividing line between the state and federal spheres of regulation of the insurance industry. In general, state regulation was to control, but

in the case of boycott, coercion and intimidation federal law was to control. Section 3(b) mentions only the Sherman Act, rather than "federal law", because the Sherman Act is the only anti-trust law which prohibits boycott, coercion and intimidation. This fact was certainly known to the Congress, because in January, 1945 Senator Ferguson, one of the co-sponsors of the bill, in referring to Section 3(b), noted that:

> "[T]he Sherman Act is the only act which relates to boycott, coercion, or intimidation." (91 Cong. Rec. 479 (1945))

It was necessary for the framers of the McCarran Act 2(b) to refer to the Clayton Act, because Sections 2, 3, 7, 8 and 10 of the Clayton Act are substantive provisions which proscribe certain conduct. Section 4 of the Clayton Act is unlike these provisions, since it is not regulatory in nature but merely provides the treble damage remedy. The Court of Appeals was therefore entirely correct in concluding that for an insurance boycott violation of the Sherman Act all federal remedies are available, including the treble damage remedy found in Clayton Act 4. (Petition App. B, pp. 9-10).

(5) Conceding as it must that the treble damage remedy remained in effect for insurance boycott violations at least until 1955, Loyal argues, as it must, that in 1955 everything was changed by the repeal of Section 7 of the Sherman Act. The legislative history attending the repeal of Section 7 of the Sherman Act, however, makes absolutely clear that the legislative intent was merely to eliminate a duplicatory treble damage provision. The House Committee Report stated:

> "Section 3 of the bill repeals section 7 of the Sherman Act inasmuch as that section has long been

> superseded by section 4 of the Clayton Act. The two sections are virtually identical except that the latter provision authorizes treble damage suits for violation of the antitrust laws as defined by section 1 of the Clayton Act, whereas the former statute authorizes such suits only for violations of the Sherman Act itself. At the present time, section 7 of the Sherman Act no longer appears in the United States Code and in prior compilations of Federal laws was considered as having been replaced by section 4 of the Clayton Act" (H. R. Rep. No. 422, 84th Cong., 1st Sess. 2 (1955)).

See also S. Rep. No. 619, 84th Cong., 1st Sess. (1955). Even the District Court below conceded that this was the only reason for the repeal of section 7, for it stated:

> "It is true, as the plaintiff contends, that Section 7 of the Sherman Act was repealed in 1955 because Congress considered it surplusage in view of the broader provisions of Section 4 of the Clayton Act." (Petition App. A p. 13)

To hold that the repeal of Section 7 of the Sherman Act in 1955 deprived private litigants of their treble damage remedy for insurance boycotts is clearly to give to this repeal an effect that Congress did not expect and could not have intended. Nevertheless, the District Court below concluded (Petition App. A p. 16):

> "In 1955, when Congress repealed Section 7, it impliedly, although perhaps unwittingly, stated there was no longer to be any private civil remedies for violations of the Sherman Act in the insurance industry."

This Court has held on numerous occasions that a statute should not be so construed as to lead to an unexpected or absurd result. *Ozawa* v. *United States*, 260 U. S. 178,

194 (1922); *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 543 (1940); *United States* v. *Bryan*, 339 U. S. 323, 338 (1950). In *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534 this court stated at p. 543:

> "Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has lead to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed the purpose rather than the literal words."

This rule has even been applied to the construction of a repealing statute. In *United States* v. *One 1955 Ford Sedan*, 164 F. Supp. 729 (D. Md. 1958), it was stated at p. 735:

> "In construing repealing statutes, it has frequently been held that a literally expressed repeal of a statute will not prevail where the intention of the legislative body is satisfactorily shown to be to the contrary."

In view of this clear legislative history of the repeal of Section 7 of the Sherman Act in 1955, and in view of the previous decisions of this Court, the Court of Appeals below was clearly correct in holding (Petition App. B, p. 8) that the repeal was merely a housekeeping measure and that it is inconceivable that Congress "would radically alter the general pattern of antitrust law enforcement in such a round-about, indirect and unobtrusive manner."

(6) The decision of the Court of Appeals below can also be upheld on a ground upon which the court did not find it necessary to pass. Loyal's entire position is based on the proposition that Section 2(b) of the McCarran Act exempted the insurance industry from the application of the entire Clayton Act, and specifically section 4. (Petition pp. 9-10). The fact is that section 2(b) does nothing of the sort. Section 2(b) provides only that "no act of Congress shall be construed to invalidate, impair or supersede" any state insurance tax or regulation. Since Section 4 of the Clayton Act is merely a remedial provision, it is difficult to see how it can possibly conflict with state law. It neither allows, prohibits, nor regulates any conduct. Section 1 of the Sherman Act may possibly conflict with state law, but this provision is clearly saved by McCarran Act §3(b). The treble damage remedy itself does not conflict with state law, and therefore was not made inapplicable by McCarran Act Section 2(b). It would be absurd to contend that application of the treble damage remedy to this lawsuit would invalidate, impair, or supersede the application of the New York insurance laws to the facts on which this controversy is based.

The proviso to Section 2(b) of the McCarran Act in terms simply makes applicable to the business of insurance three statutes which might have been rendered inapplicable by the principal clause of the section. From the plain meaning of the statute it is clear therefore that no provision ever rendered Section 4 of the Clayton Act inapplicable to the business of insurance.

II.

There is no conflict of decision or important question of federal law.

In the period of almost nine years since the repeal of Section 7 of the Sherman Act in 1955, apart from the present litigation, there has been only one reported decision on the question of whether the private treble damage remedy is available for an illegal boycott in the insurance business. In *Professional and Businessmen's Life Ins. Co.* v. *Bankers Life Co.*, 163 F. Supp. 274 (D. Mont. 1958), the Court held that the treble damage remedy was so available, although its decision was based on a different ground from that on which the decision of the Court of Appeals in the present case is based. In one other case, *California League of Independent Insurance Producers* v. *Aetna Cas. & Surety Co.*, 175 F. Supp. 857 and 179 F. Supp. 65 (N. D. Cal., 1959), the complaint sought treble damages for an insurance boycott under Section 3(b) of the McCarran Act. The Court denied the defendant's motion to dismiss for insufficiency of pleading of a boycott. As far as appears from the court's opinions the defendant did not make the technical objection to jurisdiction made by Loyal in the present case. Since the decision of the District Court in the present action has been reversed, there is therefore no conflict between any jurisdictions on the question for which Loyal now seeks review.

This issue on which Loyal now seeks the review of this Court is a narrowly limited one, namely, whether the treble damage remedy is available for insurance boycotts. Loyal does not, and cannot claim that the insurance business has an immunity to the boycott prohibitions of Section 1 of the Sherman Act. Moreover, Loyal does not, nor can it, claim

that the government lacks the power to punish an insurance boycott violation of Section 1 of the Sherman Act under power conferred by Section 1 itself, or to enjoin such a violation under Section 4 of the Sherman Act. Consequently, Loyal raises no issue as to the dividing line between state and federal regulation of the insurance business.

Since the decision of the Court of Appeals below is clearly correct, Loyal's petition for certiorari should be denied.

Conclusion.

For the foregoing reasons, it is respectfully submitted that Loyal's petition for a writ of certiorari should be denied.

Dated: February 26, 1964

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